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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL THOMAS BRATTON,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

Petition for Writ of Certiorari to the
Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS FOR REVIEW

I. Whether the trial counsel's failure to timely file an omnibus pre-trial motion constituted a violation of the petitioner's sixth amendment right to effective assistance of counsel when such failure resulted in the Commonwealth being permitted to introduce incriminating statements of the petitioner which otherwise would have been excluded and when such failure resulted in the petitioner's medical expert being barred from examining the victim and the sole testimony regarding the incident came from a nurse practitioner?

II. Whether a defendant is unfairly burdened when he is required to prove that not only was counsel ineffective, but, that the ineffectiveness substantially prejudiced the defendant and the ineffectiveness was more than harmless error when the assistance of counsel is a constitutional right fundamentally basic to a fair trial?

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EXHIBITS

Order denying Petition for Allowance of Appeal from the Memorandum Opinion and Order of the Superior Court of November 26, 1996.....Exhibit "A"

Judgment and Memorandum of the Superior Court of Pennsylvania of May 31, 1996.....Exhibit "B"

Order of the Court of Common Pleas of Susquehanna County, Pennsylvania of March 10, 1995. .....Exhibit "C"

TABLE OF CITED AUTHORITIES

	CASES	APPEARS ON PAGE
1.	Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).	4
2.	Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1976).	5
3.	Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).	5

REFERENCE TO REPORT OF OPINION BELOW

The Pennsylvania Supreme Court issued its Order denying the Petition for Allowance of Appeal from the Memorandum Opinion and Order of the Superior Court, dated November 26, 1996, at Number 461 M.D. Allocator Docket, 1996, a copy of which is appended hereto as Exhibit "A". The Superior Court of Pennsylvania issued its Order of Judgment, dated May 31, 1996, of the Superior Court of Pennsylvania at Number 03356PHL1995, a copy of which is appended hereto as Exhibit "B". The Superior Court Memorandum is expected to appear in a forthcoming volume of Atlantic Second. The Superior Court had affirmed the Order of the Court of Common Pleas of Susquehanna County, Pennsylvania, dated March 10, 1995, and a copy of such Order is appended hereto as Exhibit "C".

A copy of the Judgment and accompanying Memorandum of the Superior Court of Pennsylvania from which the Petitioner seeks Allowance of Appeal is appended hereto as Exhibit "B".

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review the Order denying the Petition for Allowance of Appeal from the Pennsylvania Supreme Court pursuant to Rule 10(b) of the Supreme Court Rules.

CONSTITUTIONAL PROVISION

U.S. Const., Amend. 6 (1791)
AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of Rape, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, Indecent Assault, Endangering the Welfare of Children and Statutory Rape, and was sentenced to a total term of imprisonment of from seven and one-half years to fifteen years (7½ to 15). Petitioner filed timely post-trial motions, which were subsequently denied by the Susquehanna County Court of Common Pleas, and Petitioner filed an Appeal Nunc Pro Tunc from the judgment of sentence to the Pennsylvania Superior Court.

Petitioner's Public Defender filed an Omnibus Pre-trial Motion, which sought to exclude various incriminating statements made by Petitioner, along with a request to allow the defense medical expert to examine the victim in this matter. The Omnibus Pre-trial Motion was filed three (3) days after the statutory thirty (30) day limit, and therefore was summarily denied. Counsel's failure to file said motion within the prescribed statutory time limit was the basis for Petitioner's ineffective assistance of counsel claim to the Pennsylvania Superior Court.

The Pennsylvania Superior Court affirmed the decision of the Susquehanna County Court of Common Pleas, stating that while the tardiness in filing the Omnibus Pre-trial Motion was an issue of arguable merit, that it none-the-less amounted to harmless error.

On November 26, 1996, the Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal from the Memorandum Opinion and Order of the Superior Court.

REASONS FOR ALLOWANCE OF WRIT

The judgment of the Superior Court of Pennsylvania, dated May 31, 1996, affirming the sentence of the Susquehanna County Court of Common Pleas and denying the Petitioner's Ineffective Assistance of Counsel claim is not supported by the evidence. Although the Superior Court correctly employed the established standards to determine Ineffective Assistance of Counsel claims, the court erred in its holding that the ineffectiveness of the representation did not prejudice the Petitioner, Paul Thomas Bratton. Trial counsel's failure to submit a timely Omnibus Pre-trial Motion prejudiced the Petitioner in his pursuit of a fair trial.

The Omnibus Pre-trial Motion filed late by the Public Defender requested that a medical expert be allowed to examine the child victim and contained requests to suppress incriminating statements made by the Petitioner to investigating troopers. The medical examination of the victim in this matter was crucial to the defense. The Commonwealth established the allegations of rape through medical testimony of a nurse practitioner, who was the only individual to ever examine the victim.

It is the Petitioner's contention that, had an expert been allowed to examine the child, the court would have decided that the testimony of the Nurse Practitioner was not proper substantive evidence to show penetration. Thus, the Petitioner was prejudiced by the ineffective assistance of counsel in failing to file a timely motion.

The Omnibus Pre-trial Motion also sought to exclude from evidence certain statements made by Petitioner to investigating officers. One of these statements was a question as to whether the Petitioner could get into trouble if the victim had initiated the contact. The trial transcript does not evidence a reading of Miranda Rights to the Petitioner nor does it appear that the Petitioner was ever informed of his constitutional rights regarding the interviewing process. The use of these statements against the Petitioner violated his civil rights, as well as establishing prejudice under the test set forth in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).

In Pierce, the court held that in order to establish an ineffective assistance of counsel claim, an Appellant must prove that the issue underlying the claim of ineffectiveness has merit; that the course of action or inaction chosen by counsel had no reasonable basis in advancing Appellant's interests; and that the Appellant suffered prejudice as a result of the counsel's action or inaction. The tardy Omnibus Pre-trial Motion was dismissed solely on the basis that it was filed after the thirty (30) day statutory time period, presenting an argument possessing arguable merit. Petitioner's interests were not advanced by the late filing of said motion and the failure to file the Omnibus Pre-trial Motion within the statutory time limit prejudiced the defendant by allowing into evidence the incriminating statements, which would have otherwise been excluded. The statements subsequently used against the Petitioner were a violation of his Civil Rights.

A second argument is advanced by Petitioner focusing on his rights guaranteed him by the Constitution of the United States, the right to due process, mandating the right to a fair trial. The Sixth Amendment defines the components of a fair trial, specifically the right to assistance of counsel. By requiring a defendant who brings a claim of Ineffective Assistance of Counsel to prove not only that counsel was ineffective, but that the ineffectiveness substantially prejudiced the defendant, unfairly burdens a defendant. Because assistance of counsel is a constitutional right fundamental to a fair trial, any ineffectiveness is prejudice to a defendant.

The Superior Court of Pennsylvania erred in its application of a "harmless error" standard in establishing that the ineffective assistance of counsel failed to prejudice the Petitioner. In Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155, 165-66 and 162 (1978), the court held that "essentially, a harmless error standard seeks to determine whether the error had a prejudicial effect" and that the burden of showing harmless error was upon the Commonwealth. The utilization of a "harmless error" analysis in determining whether counsel is effective violates the rights of the Petitioner. Assistance of counsel is among those "constitutional rights" so basic to a fair trial that their infraction can never be treated as harmless error.

Instructive precedent regarding the issue of the Ineffective Assistance of Counsel Claim leads to the United States Supreme Court case, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, Justice Marshall dissented from the majority opinion and asserted an opinion that it is very difficult to discern whether a defendant would have done better if represented competently after conviction of a defendant at trial, in which he had ineffective representation. Justice Marshall further noted that the constitutional guarantee to a fair trial, including effective counsel, operates to "ensure that convictions are obtained only through fundamentally fair procedures". Id. Due Process is not furthered by a proceeding in which the Petitioner failed to receive effective representation. In the words of Justice Marshall, "every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer." Id. The Petitioner's Sixth Amendment right to a fair trial is violated when he fails to receive effective representation.

CONCLUSION

Based upon the foregoing reasons, the Petitioner, Paul Thomas Bratton, respectfully requests this Honorable Court grant the instant Petition for Writ of Certiori.

Respectfully submitted,

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EXHIBIT "A"

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

vs.

PAUL THOMAS BRATTON,
Petitioner

No. 461 M.D. Alloc. Dkt. 1996
Petition for Allowance of
Appeal from the Memorandum
Opinion and Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 26th day of November, 1996, the Petition for Allowance of Appeal is DENIED.

A TRUE AND CORRECT COPY
ATTEST: 11/27/96
/s/ SHIRLEY P. BAILEY
CHIEF CLERK

EXHIBIT "B"

IN THE SUPERIOR COURT OF PENNSYLVANIA

J. S11010/96

COMMONWEALTH OF PENNSYLVANIA

vs.

PAUL THOMAS BRATTON,
Appellant

No. 03356 Philadelphia 1995

Appeal from the Order Entered March 10, 1995, in the Court of Common Pleas of Susquehanna County, Criminal, No. 1994-61

BEFORE: McEWEN, P.J., SAYLOR, and HESTER, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of SUSQUEHANNA County be, and the same is hereby AFFIRMED.

BY THE COURT:
SIGNATURE ILLEGIBLE
PROTHONOTARY

Dated: MAY 31, 1996

IN THE SUPERIOR COURT OF PENNSYLVANIA

J. S11010/96

COMMONWEALTH OF PENNSYLVANIA

vs.

PAUL THOMAS BRATTON,

Appellant : No. 03356 Philadelphia 1995

Appeal from the Order Entered March 10, 1995, in the Court of Common Pleas of Susquehanna County, Criminal, No. 1994-61

BEFORE: McEWEN, P.J., SAYLOR, and HESTER, JJ.

MEMORANDUM:

Appellant, Paul Bratton, has taken this appeal nunc pro tunc from the judgment of sentence[1] to serve a total term of imprisonment of from seven and one-half years to fifteen years, imposed after he was found guilty by a jury of two counts of rape[2], two counts of involuntary deviate sexual intercourse[3], and one count of endangering the welfare of children.[4] After careful consideration of the record, we affirm the judgment of sentence.

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[1] Appellant was sentenced to a term of imprisonment of from one year to not more than five years for endangering the welfare of children. This term was to run concurrently with the four concurrent terms of from seven and one-half years to not more than fifteen years imposed for the remaining four counts. Appellant was also fined and ordered to make restitution for counseling for the victim and to receive sex abuse counseling while incarcerated and while on parole.

[2] 18 Pa.C.S. § 3121.
[3] 18 Pa.C.S. § 3123.
[4] 18 Pa.C.S. § 4301.

Appellant contends that he is entitled to a new trial as the result of the ineffective representation provided by trial counsel who filed omnibus pretrial motions more than 30 days after arraignment, resulting in their summary dismissal pursuant to Pa.R.Crim.P. 307. The underlying omnibus pretrial motions which were dismissed as untimely had requested (1) the suppression of statements made by appellant to a caseworker for Susquehanna County Services for Children and Youth (hereinafter "CYS"), and to members of the Pennsylvania State Police, and (2) the payment of funds to hire an expert witness and an investigator. Appellant argues on appeal that, if trial counsel had timely filed those motions, the motions would have been granted. Appellant claims that he was prejudiced by counsel's failure since, if the evidence had been suppressed, he would not have been found guilty of the sexual assault upon the victim. We are not persuaded of the merit of appellant's arguments and, therefore, affirm.

Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the evidence established that on January 25, 1994, Mrs. Bratton, appellant's wife and the victim's mother, was notified by a caseworker for CYS that her daughter had made allegations of sexual abuse against appellant. Mrs. Bratton, who was at work at the time, had been told of these allegations the night before by the victim, who was 11 years old.

CYS determined an investigation was warranted and informed Mrs. Bratton that for the next 30 days either her daughters, or her husband must leave the family home. Appellant moved out of the home and, on February 15, 1994, Trooper Jeffrey Balut, of the Pennsylvania State Police, and Charmarie Bisel, a CYS supervisor, interviewed Mrs. Bratton and the victim. Appellant was also interviewed by Mr. Williams, Trooper Balut and Trooper Jeffrey Biondo. The CYS representatives and the state troopers determined, as a result of these interviews, that the victim should be removed from the family home based upon a visit by appellant to the family home within the 30-day investigatory period.

The victim was examined on March 14, 1994, by Sue Perdew, Ph.D., a nursing professor and family nurse practitioner, and appellant was arrested 14 days later and charged with 11 counts of sexual abuse. Appellant, represented by the Office of the Public Defender, was arraigned on April 26, 1994, and counsel filed an omnibus pretrial motion on June 1, 1994, which was granted by order dated that same day. Subsequently, the trial court, in response to the motion of the Commonwealth, vacated its earlier order and dismissed the motion as untimely.

The Commonwealth filed a pretrial motion requesting leave, pursuant to 42 Pa.C.S. § 5985.1(b), to introduce into evidence the out-of-court statements made by the victim to Trooper Balut, Ms. Bisel, and Mr. Williams. The motion in limine filed by appellant to exclude those statements based on the lack of the requisite indicia of reliability was denied by the trial court after a hearing. Trial commenced with the selection of a jury on December 7, 1994, and appellant was found guilty following a two-day trial during which the Commonwealth presented the testimony of the CYS investigators, Dr. Perdew, the investigating state troopers, and the victim. Appellant presented Dr. Joseph Cama, an expert in the field of child abuse; his wife, Mrs. Bratton; his wife's mother; Justin Thompson, who knew the victim from school; and also testified in his own defense. On rebuttal, the Commonwealth called Mrs. Susan Marie Rookstool, the victim's foster mother; and Trooper Balut.

Appellant contends that he is entitled to a new trial by reason of trial counsel's ineffective representation. Our standard of claims of ineffective assistance of counsel is well settled:

> In order to establish an ineffective assistance of counsel claim, the appellant must meet the three prong test articulated in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). Appellant must establish that the issue underlying the claim of ineffectiveness has merit. Second, Appellant must establish that the course of action or inaction chosen by counsel had no reasonable basis in advancing Appellant's interests. Third, Appellant must establish that he suffered prejudice as a result of the counsel's action or inaction. Prejudice in this context has been defined to mean that Appellant must establish that but for the arguably ineffective act or omission there is a reasonable probability that the result would have been different. Commonwealth v. Douglas, 537 Pa. 588, 597, 645 A.2d 226, 230 (1994). Appellant bears the burden of proving all three prongs of this standard. Commonwealth v. Baker, 531 Pa. 541, 562, 614 A.2d 663, 673 (1992). Moreover, the law in Pennsylvania presumes that counsel was effective. Commonwealth v. Cross, 535 Pa. 3~, 634 A.2d 173 (1993); Commonwealth v. Pierce, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987).

Commonwealth v. Crawley, 541 Pa. 408, ___, 663 A.2d 676, 679 (1995). A reasonable probability must exist that but for trial counsel's ineffectiveness the result achieved at trial would be different. Commonwealth v. Horton, 434 Pa.Super. 478, 486, 644 A.2d 181, 185 (1994).

The first claim of ineffectiveness presented by appellant is predicated upon the failure of trial counsel to timely file the omnibus motion, a failure which resulted in the denial of the motion to suppress the statements made by appellant to investigators.[5] This argument possesses arguable merit since the omnibus pretrial motion was dismissed solely on the basis that it had been filed beyond the 30-day time period provided by Pa.R.Crim.P. 307. The record reveals, however, that the evidence of the guilt of appellant was clear and abundant, and, therefore, appellant is not entitled to any relief since he cannot establish prejudice.

[5] These statements were made by appellant during the interview conducted at the offices of CYS attended by Mr. Williams, Trooper Balut, and Trooper Biondo. Appellant stated that he would sit naked in the hot tub, while his stepdaughters were home and his wife was at work. Appellant claimed that the victim became "overly friendly" once and might have brushed up against his penis. Appellant also inquired if he could get into trouble if the victim had initiated the contact.

A review of the testimony reveals that Mrs. Bratton testified that appellant had sole control over the victim and her sister[6] at the times of the two incidents, and Dr. Perdew testified that the injuries exhibited by the victim were caused by a blunt object being forced into her vagina. Dr. Perdew, who stated that the victim had severe anal scarring that was no more than three months old, testified:

> The statements the child made which clearly stated sexual abuse were supported specifically by the physical evidence of a healed penetrating injury to the hymen and the anal fissure, the lax anus, the fecal soiling, the scarring and the venous congestion of the anus. The anal signs are consistent with repeated sodomy.

Dr. Perdew stated that it was her professional opinion that her physical findings were consistent with sodomy occurring in the summer of 1993, as alleged by the victim.

The victim testified at trial that appellant, whom she feared, had touched her vagina with his fingers and his tongue and that he placed his penis in her bottom. The victim also testified that appellant had kicked her in the groin, and that she had kicked him in the groin, and had once successfully fought off his sexual advances.

The evidence presented by the Commonwealth was more than sufficient to prove each of the elements of the charged offenses beyond a reasonable doubt. Commonwealth v. Owens, 437

[6] Mr. Williams testified that the victim's sister had told him that "her stepfather had told her that he wouldn't do that to her because he liked redheads." The victim had red hair.

Pa.Super. 64, 73, 649 A.2d 129, 135 (1994), allo. denied, ___ Pa. ___, 656 A.2d 118 (1995); Commonwealth v. Poindexter, 435 Pa.Super. 509, 517, 646 A.2d 1211, 1214 (1994), allo. denied, ___ Pa. ___, 655 A.2d 512 (1995); Commonwealth v. Kunkle, 424 Pa.Super. 499, 503, 623 A.2d 336, 338 (1993), allo. denied, 536 Pa. 621, 637 A.2d 281 (1993); Commonwealth v. Cody, 401 Pa.Super. 85, 584 A.2d 992 (1989), allo. denied, 527 Pa. 622, 592 A.2d 42 (1991). The evidence of guilt, moreover, was overwhelming, investigators even had the statements of appellant to been suppressed. Thus, appellant cannot establish that he was prejudiced by the ineffectiveness of trial counsel which resulted in the denial of his motion to suppress his statements since there is no reasonable probability that but for trial counsel's ineffectiveness the outcome of the trial would have been different. The request for a new trial based upon counsel's ineffectiveness must, therefore, be rejected as meritless.

Nor is there any basis for relief as a result of the ineffective representation by counsel which resulted in the denial of the motion for funds for investigators and experts, specifically for a licensed physician to examine Stephanie. While this claim also raises an issue of arguable merit, appellant has failed to demonstrate that trial counsel's failure to timely file the motion prejudiced him.

Appellant did retain an expert, Dr. Joseph Cama, who was accepted by the court as an expert in child abuse investigations, and who testified on behalf of appellant. Dr. Cama, who stated that he normally testifies on behalf of victims, testified that he had reviewed all of the reports of Dr. Perdew, the police, and the school file of the victim and provided an explanation for Dr. Perdew's findings other than criminal conduct.

Appellant has failed to demonstrate prejudice which would warrant the grant of a new trial as the testimony of Dr. Cama would not have been substantially different had he examined the victim and, in light of the testimony of the victim and the overwhelming evidence of guilt, the outcome of the trial could not have been affected. Appellant has, therefore, failed to demonstrate the prejudice which is essential in order to be entitled to any relief as a result of a claim of ineffective assistance by trial counsel.

Judgment of sentence affirmed.

EXHIBIT "C"

IN THE COURT OF COMMON PLEAS OF THE THIRTY-FOURTH JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA

vs.

PAUL THOMAS BRATTON

1994-61 CR

ORDER OF COURT

AND NOW, this 10th day of March, 1995, upon consideration of defendant's post-sentence motions,

IT IS ORDERED that defendant's motion for new trial and in arrest of judgment be denied.

IT IS FURTHER ORDERED that defendant's motion for reconsideration of sentence be denied.

By the court,

/S/ Kenneth W. Seamans, P.J.

IN THE COURT OF COMMON PLEAS OF THE THIRTY-FOURTH JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA

vs.

PAUL THOMAS BRATTON

1994-61 CR

Jeffrey Snyder, Esquire, Attorney for the Commonwealth
Marion O'Malley, Esquire, Attorney for the Defendant

OPINION

Seamans, P.J.

The defendant stands convicted of various counts of rape, involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault, endangering welfare of children, and statutory rape. His post-sentence motions, a motion for new trial and in arrest of judgment, as well as a motion to modify sentence, are before us for our determination.

Defendant contends that we erred in failing to suppress defendant's incriminating statements and the fruits thereof. The record shows that the defendant was arraigned on April 26, 1994 and was advised, inter alia, that he had 30 days within which to file all pretrial motions. He was represented by counsel at the time of his arraignment. On June 1, 1994, defendant, through counsel, filed an "omnibus pre-trial motion - motion to suppress statements", 36 days after arraignment. We properly dismissed defendant's motion, inasmuch as no facts were advanced which would justify a derogation of the 30-day filing deadline. Rule 307, Pa.R.Crim.P.

Defendant next claims that we erred in failing to grant his request for funds for experts and as well as his request for the services of a medical expert to assist him with his defense. On the contrary, the record shows that, although defendants request was

initially denied, the court did direct at the conclusion of the trial that the defendant's expert witness, who testified at trial, be compensated by Susquehanna County.

The balance of defendant's motion for new trial and in arrest of judgment consists of "boilerplate" averments that the evidence was either insufficient to sustain the verdicts or that the evidence was contrary to those verdicts and that the Commonwealth failed to sustain its burden of proof beyond a reasonable doubt. The rule is, however, that "[t]he motion shall state with particularity the grounds for the motion, the facts that support each ground, and the types of relief or order requested." Rule 9020(b)(2), Pa.R.Crim.P. The instant motion does not state facts (or note the absence of facts) bearing on the issues of weight and sufficiency of evidence.

The motions for new trial and in be denied.

Finally, defendant would have us modify his sentence on grounds that the sentence exceeds the statutory minimum by two and one half years and that the defendant had never been in trouble with the law prior to the present charges.

Nothing prohibits the sentencing court from exceeding the mandatory minimum sentence Imposed upon conviction of the most serious crimes charged in this case. The court lawfully imposed a seven and one-half year minimum sentence for reason which it articulated on the record.

The motion to modify sentence must be denied.